(3)

No. 98-430

FILED

OCT 28 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

PARENT-GUARDIAN ASSOCIATION OF ARLINGTON DEVELOPMENTAL CENTER,

Petitioner,

v.

PEOPLE FIRST OF TENNESSEE, on behalf of its members, et al.;

ARLINGTON DEVELOPMENTAL CENTER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI

WILLIAM J. BURKE,
Counsel of Record
BURKE & STONE
400 MADISON AVENUE
NEW YORK, NY 10017
(212) 752-5353

WILLIAM F. SHERMAN
ATTORNEY AT LAW
504 PYRAMID PLACE
221 WEST SECOND STREET
LITTLE ROCK, AR 72201
(501) 372-3148

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

22 pp

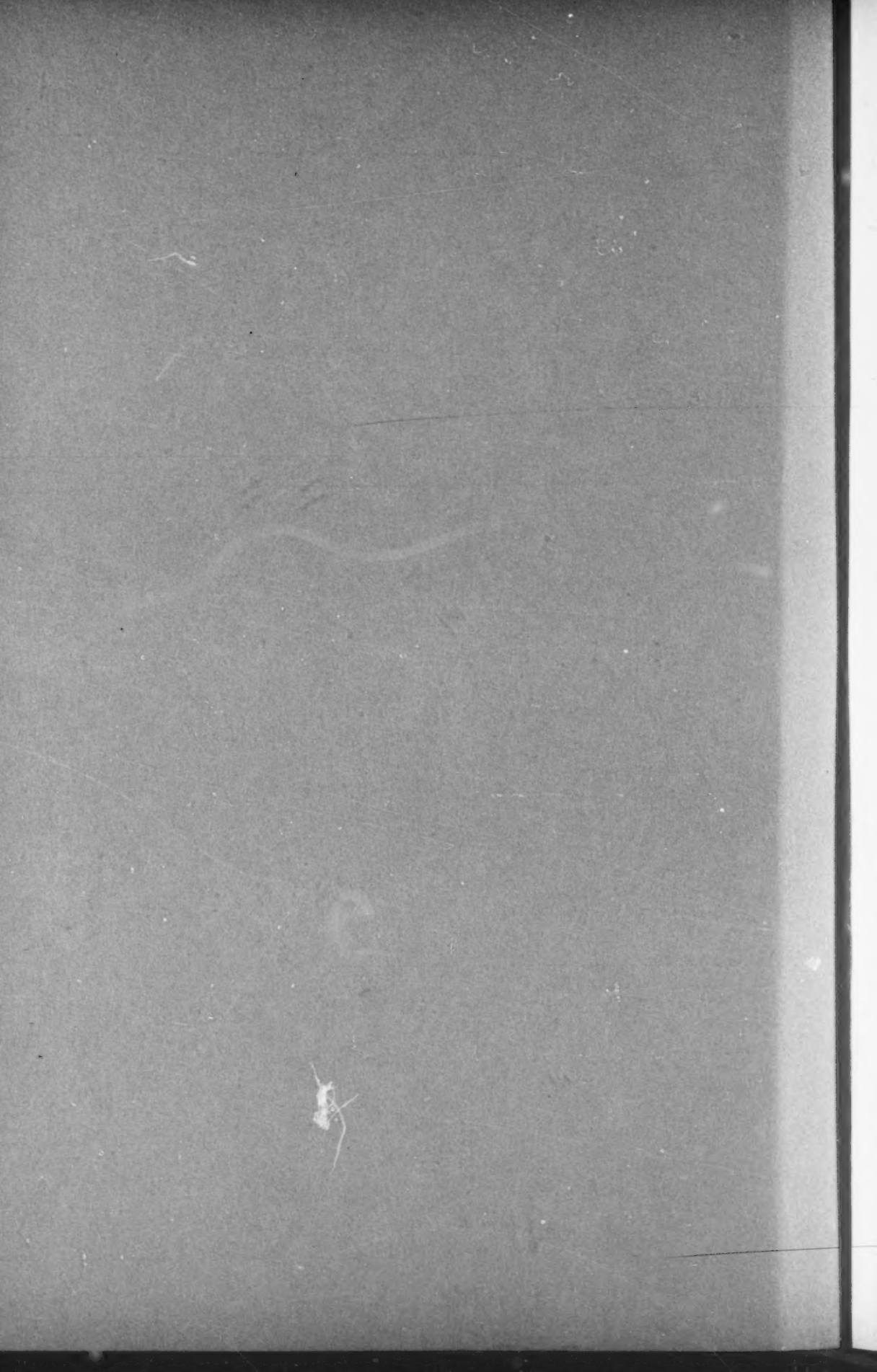

TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement 1

Record Response 2

Argument 5

I. Even if a Class Certification Were Appropriate, the Conflicting Interests Required Subclass Creation on the District Court's Own Initiative 5

II. The First Amendment Claim Was Collusively Settled, and Improperly Made 8

Conclusion 10

APPENDIX

Appendix U
Colloquy From Hearing Transcript, 27 September 1996 . . . . . 270a

Appendix V
Excerpts From Deposition of Ruthie-Marie Beckwith and Exhibit 23 . . . . . 272a

Appendix W
Colloquy From Hearing Transcript, 31 March 1995 . . . . . 277a

TABLE OF AUTHORITIES

Cases:

Amchem Products, Inc. v. Windsor,
521 US--, 117 S. Ct. 2231;
138 L. Ed. 2d 689 (1997). 1, 6

Gulf Oil Co. v. Bernard,
452 US 89 (1981) 6

Ortiz v. Fiberboard Corp.,
-- US --; 141 L. Ed. 2d 711;
-- S. Ct. -- (June 22, 1998; order
granting certiorari) 4

Pennhurst State School and Hospital v. Halderman,
451 US 1 (1981); 465 US 89 (1984) 7

Other:

FRCP 23(c)(4)(B) 5

FRCP 23(c)(4) Advisory Committee 5

Preliminary Statement

Respondent apparently concedes that the Petition raises "grand issues", while contending that they are not properly presented in this case. (Opp. Br. at 13.) This misses the principal argument made: that the issues appear in the person of the class representative. At the very least, subclasses should have been created to present the different perspectives and remedies in the implementation phase of this litigation.[1]

The reality of this case is the power to speak for all within the certified class. Because of the division of interest over the "grand issues", People First should not have been named the class representative -- speaking for the 137 Arlington PGA members filing affidavits opposing the certification. (Point I, below.) Petitioner also submits that disposition of the stated associational claim below was the collusive settlement of a nonjusticiable political question raised by an advocacy group. (Point II, below.)

As Petitioner's trial counsel noted below:

> "The concern, really, is that people who have a different interest from the parents are trying very hard to get in the position to make

---

[1] Petitioner continues to contest the propriety of any class under the criteria of Amchem Products, Inc. v. Windsor, 521 US--, 117 S. Ct. 2231; 138 L. Ed. 2d 689 (1997). The District Court initially agreed, concluding that class certification was unnecessary. (Reply App. at 277-8a.)

individual decisions for the residents at the Center. We have a class certification which...provides one bit of leverage in that regard." (Reply App. at 270-1a.)

Record Response

Permitted to correct "perceived misstatement[s]" by this Court's Rule 15.2, Respondent litters its brief with over a dozen charges of "misrepresentations"; "mischaracterization" or "misleading". (Opp. Br. at, e.g., 10-13.) The best response is from the record.

The Remedial Order in the DOJ Action supposedly benefits Petitioner. (Opp. Br. at 11, 14-19.) It actually provides, in pertinent part:

"A. Defendants shall reduce the population of ADC to 200 persons or fewer by September 30, 1997.

B. * * *

(1) Defendants are enjoined from admitting any additional residents to ADC except for emergency, short-term court-ordered admissions." (Pet. at 209a; Remedial Order, ¶¶ XIV[A] and [B][1]; emphasis added.)

This encourages closure in pending proceedings to implement the Remedial Order, whether directly or by downsizing ADC beyond the point of economic survival.[2]

Petitioner accuses Respondent of using the federal courts to try to close ADC. Respondent replies that this "is a mischaracterization, unsupported by any evidence of record". (Opp. Br. at 13.) Let us see.

People First sought institutional closure by, inter alia, approving "a process to depopulate the state's large congregate care facilities". (Reply App. at 273-5a.) It also published the following broadside:

"PEOPLE FIRST OF TENNESSEE, INC.

We believe institutions are harmful and limit life choices.

Institutions stop people from exercising their rights and leading a normal life.

People with disabilities should have a choice to live wherever and with whomever they want.

---

[2] The Remedial Order was filed on 2 September 1994 in the DOJ Action (Pet. at 166a), with no input or consent from Arlington PGA. It was not permitted to intervene therein until over a year later, on 27 September 1995. (Pet. at 74a.) To the extent proceedings to enforce the Remedial Order seek to downsize ADC, Arlington PGA has tried to resist. We trust Respondent did not mean to suggest otherwise.

> Any person regardless of disability should have the same opportunity to receive support and services as anyone else.
>
> All services and supports should be in the community.
>
> Therefore, we believe all institutions should be closed and the people set free." (Reply App. at 276a.)

Accordingly, the closure of ADC was a goal sought by Respondent, and opposed by Petitioner. As in Ortiz v. Fiberboard Corp., -- US --; 141 L. Ed. 2d 711; -- S. Ct. -- (June 22, 1998; order granting certiorari), these were conflicting interests precluding class representation status to one competitor.[3]

---

[3] For alleged procedural "misrepresentations", we respectfully refer the Court to Pet. at 42-44a (claim against Tennessee) and at 7 (description of DOJ action, on appeal as to implementation of the remedial order). Respondents' attempt to strip Petitioner of the experienced anguish of its parent members (Opp. Br. at 12 and n. 5) is unworthy.

ARGUMENT

I. EVEN IF A CLASS CERTIFICATION WERE APPROPRIATE, THE CONFLICTING INTERESTS REQUIRED SUBCLASS CREATION ON THE DISTRICT COURT'S OWN INITIATIVE.

Respondents complain that Petitioner "never sought class representative status[;] never offered its own class definition, and never proposed the creation of subclasses". (Opp Br. at 11-12.) With respect, the argument misses the mark.

The District Court expressed doubt that class certification was proper or necessary. (Reply App. at 277-8a.) In any event, subclass creation is a matter of judicial administration, chargeable to the district judge whether or not a party moves.

FRCP 23(c)(4)(B) provides:

> "[A] class may be divided into subclasses, and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

In its 1996 note to FRCP 23(c)(4), the Advisory Committee noted:

> "Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class."

In Gulf Oil Co. v. Bernard, 452 US 89 (1981), this Court referred to a district court's order-making powers under FRCP 23(d) once a class had been certified, and concluded:

> "Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action [by] enter[ing] appropriate orders...". (452 US at 100.)

See, also, Amchem Products, Inc. v. Windsor, supra, 521 US --, at --; 117 S. Ct. 2231, at 2248-9; 138 L. Ed. 2d 689, at 710-2 (1997).[4]

This is not just an administrative error. An advocacy group has now been permitted to pre-empt parents and guardians as advocates for their children and wards under the guise of class representative status. Perkin Warbeck has been crowned king.

This case goes beyond the borders of Tennessee. The tension between institutionalization and community placement of the nation's disabled troubles every state government. The lower court's failure to create subclasses in the implementation phase of this litigation promoted an advocacy

---

[4] Attempting to escape from Amchem, Respondent startlingly claims that there is no conflict between Arlington PGA and People First because "the Remedial Order satisfies both interests." (Opp. Br. at 23.) As discussed above, Arlington PGA's 137 affiants (App. at 52a, n. 6) resist any effort to construe the Remedial Order to close ADC, and are in no position to make a First Amendment claim (see App. at 239a). The clear division of interests remains.

group to be the sole proponent of the needs of the disabled. More litigation can be imagined.[5]

This case also transcends disability litigation. In any class action, upon the decision below, the class representative need not be a plaintiff with real injuries; the professional advocate displaces her. One can only imagine the consequences in mass tort litigation; claims of securities fraud from a public offering; product liability claims, or any other area within this Court's collective experience.

Unless this Court grants review, an unjust and unnatural exclusion of parents and guardians will recur whenever an institution's shortcomings are challenged by alert, able and effective outside advocates. A relaxation of the strict class action requirements is also threatened, in direct defiance of Amchem, supra. This case calls out for review of the class certification order.

---

[5] Respondents cite to the Pennhurst "institutional litigation" for a procedural point. (Opp. Br. 5, at n. 4.) Counsel modestly fails to note that they were instrumental in developing the constitutional rights of Pennsylvania's disabled in Pennhurst State School and Hospital v. Halderman, 451 US 1 (1981) and 465 US 89 (1984). Their expertise in pursuit of institutional closure is undisputed.

II. THE FIRST AMENDMENT CLAIM WAS COLLUSIVELY SETTLED, AND IMPROPERLY MADE

Respondent does not address either of our alternate objections to the settlement of the First Amendment claim: that it was collusive, and that it was nonjusticiable. (Pet., Point II and n. 22.) It is nonresponsive to claim that we have "identified no abuse of discretion", or that Tennessee had stipulated to past violations. (Opp. Br. at 24-25.)

Approval of collusion is most certainly an abuse of discretion. Tennessee's "stipulation" was strongly qualified two years later, at oral argument before the Court of Appeals in March, 1998[6]. Counsel candidly stated, as an officer of the court, that admissions of First Amendment violations were made solely to dispose of the case. Notably, the settlement provides for no payment of damages caused by the "stipulated" conduct. (Pet. at 20-21a.)[7]

This result also indicates that there was no constitutional case or controversy in the first place. A claim which results only in a "policy" belongs in the political forum rather than the courts.

---

[6] Tennessee has taken no position on the petition.

[7] At hearings to approve the settlement, the District Court repeatedly precluded Petitioner from establishing that there were no First Amendment violations. Tennessee's concession vindicated Petitioner's position.

A broader point appears. When 137 members of a purported "class" file statements affirming that their family members have suffered no violations (Pet. at 53a, last paragraph of n. 6), where is the class? When the District Court finds that only a "fairly small number of people" can "really exercise" the associational rights at issue, where are the plaintiffs?

These are the questions raised when outside advocates bring reforming litigation for "next friends". Class certification of collusive settlements is highly inappropriate.

CONCLUSION

For the reasons set forth above, and in the Petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Dated: New York, New York
October 26, 1998

Respectfully submitted,

/s/_____
WILLIAM J. BURKE, ESQ.
Counsel of Record for Petitioner
BURKE & STONE
400 Madison Avenue
New York, New York 10017
(212) 752-5353

/s/_____
WILLIAM F. SHERMAN, ESQ.
Co-counsel to Petitioner
221 West Second Street
504 Pyramid Place
Little Rock, Arkansas 72201
(501) 372-3148

APPENDIX U

COLLOQUY FROM HEARING TRANSCRIPT,
27 SEPTEMBER 1996

* * *

[p.31] CROSS - CAMPBELL

THE COURT: D. defendant shall allow class representatives of the advocates, members of religious organizations, community organizations reasonably responsible to communicate -- I'm sorry, reasonable opportunities to communicate with all class members and shall afford all class members reasonable opportunity to participate in community activities. That's what we're talking about here. Does that preclude considering the interest of parents and guardians in the development of a policy?

MR. DERRYBERRY: Not to my knowledge, Your Honor.

THE COURT: I didn't notice that it did.

MR. SHERMAN: He didn't mandate, Your Honor, that a policy be developed within 30 days. I assume that means a written policy. The concern, really, is that people who have a different interest from the parents are trying very hard to get

in the position to make individual decisions for the residents at the Center. We have a class certification which gives one --provides one bit of leverage in that regard. This is one more order which would , we contend, give the advocates for the plaintiffs more involvement in the decision-making progress, not just on assembly and speaking, but on what choices they make across a whole range of things. This is a situation where most of the people there are incompetent, Your Honor.

APPENDIX V

EXCERPTS FROM DEPOSITION OF RUTHIE-MARIE BECKWITH AND BECKWITH EXHIBIT 23.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PEOPLE FIRST OF TENNESSEE, ET AL., Plaintiffs,	) Civil Action No. 92-2213-M1/Bro
vs.	)
ARLINGTON DEVELOPMENTAL CENTER, ET AL., Defendants,	)
PARENT-GUARDIAN ASSOCIATION OF ARLINGTON DEVELOPMENTAL CENTER, Intervenor.	)

Deposition of:

RUTHIE-MARIE BECKWITH
Taken on behalf of the Defendants
April 19, 1993

APPEARANCES:

For the Plaintiffs: Mr. Jack W. Derryberry, Jr.
Attorney at Law
Nashville, Tennessee

For the Defendants: Ms. Linda A. Ross
Assistant Attorney General
Nashville, Tennessee

* * *

Q. Are you familiar with a motion that was adopted by region five of the advisory planning committee that was presented to the State Advisory Planning Committee in, I believe, June of 1991 that called for a process to depopulate the state's large congregate care facilities, replacing them with community residence of no more than four persons, and to expand and strengthen community services, the community service delivery system.

A. I'm familiar with that motion, that it was introduced to the State Advisory Planning Committee.

Q. Did People First support the adoption of that motion by the state?

A. We are not on the region five committee. We don't have --

Q. No. My question was did you support the adoption of that motion when it was presented to the State Advisory Planning Committee of which you are --

A. We didn't present the motion.

Q. Listen to my question. You have said you are familiar with the motion that region five adopted.

A. I was at the committee meeting when the motion was introduced.

Q. Which committee meeting are we talking about?

A. The June State Advisory Planning Committee meeting.

Q. The State Advisory Planning Committee?

A. When it was discussed, I was present at the meeting.

Q. What position did People First take on that motion when it was presented to the State Advisory Planning Committee?

A. To the best of my recollection, the board representative for People First voted in favor of the motion. But I mean that would be -- you could determine that from the minutes of the committee.

Q. Had that motion been discussed by People First of Tennessee prior to the meeting of the state committee?

A. No.

* * *

EXHIBIT - BECKWITH 23

PEOPLE FIRST OF TENNESSEE, INC.

We believe institutions are harmful and limit life choices.

Institutions stop people from exercising their rights and leading a normal life.

People with disabilities should have a choice to live where ever and with whomever they want.

Any person regardless of disability should have the same opportunity to receive support and services as anyone else.

All services and supports should be in the community.

Therefore, we believe all institutions should be closed and the people set free.

APPENDIX W

COLLOQUY FROM HEARING TRANSCRIPT
31 MARCH 1995

* * *

MR. SHERMAN: Can I make a statement, Your Honor?

THE COURT: Absolutely.

MR. SHERMAN: It has always been, I think, the assumption that the plaintiffs had to have class certification to make their arguments. Isn't it true that they don't need class certification to make all their arguments?

THE COURT: No, I agree with you.

MR. SHERMAN: Particularly, why is class certification important?

THE COURT: It is not required, I agree with you.

MR. SHERMAN: If it is not required, then perhaps it is a waste of energy.

MS. ROSS: Your Honor --

THE COURT: I don't know.

MS. ROSS: I'm not sure the state would agree with that. I mean the definition of the class might very well make -- they are seeking certification of the class of all individuals --

THE COURT: I understand. For example, as to an individual plaintiff named in this case, there may be a specific remedy that they seek. I think that Mr. Sherman, when he says that they're not precluded from making that argument, is absolutely right. I think that they can come in and say as to a particular plaintiff, a particular individual, we think this remedy is the one that needs to be implemented. It needs to be implemented now, Judge, without regard to the class question. So I think Mr. Sherman is right. Now, your point is that for broader class relief that it would have to be certified.

MS. ROSS: Yes.

THE COURT: Well, it depends on whether it falls -- you know, which category it falls in. If you're trying to get something done for individuals represented by Mr. Sherman, Mr. Sherman may say look, I don't want this.

* * *